Virginia Law Register

VOL. XVII.] AUGUST, 1911. [No. 4.

PLEAS IN EQUITY, AND THE PROPER MODE OF TESTING THEIR SUFFICIENCY.

The attention of the writer having been called, by a judge of one of the inferior courts of this state, to the pleading in the case of Sutherland *v.* Peoples' Bank, reported in 69 S. E. 341, and 16 Va. Law Reg. (February), 744, and an examination of that case having shown a rather curious state of affairs, it is made the peg upon which to hang a short discussion of our system of pleas in equity and the proper mode of testing their sufficiency, as laid down by the leading authorities.

In this case we have a suit in equity to enforce the lien of a judgment against S. and three others. S. was the maker and the others indorsers of a note, upon which judgment had been obtained against them. Process in the suit at bar was regularly served on the three indorsers, but the return was of a constructive service, by posting at his usual place of abode, on S., who made no appearance or defense. The three codefendants who were served, put in what the court calls a *plea in abatement* to the bill, alleging that S. was the party primarily liable and that he had not been summoned as required by law to answer the bill, the return of the sheriff being alleged to be false, and that the necessary parties were not before the court, and asking that the writ and return be quashed. To this plea the complainant *demurred.*

The lower court sustained the demurrer, dismissed the plea and referred the suit to a commissioner. The supreme court of appeals said: "It is objected however, that the court should not have entertained a demurrer to the plea in equity—which is true—but if, beneath the form in which the objection to the plea is presented it appears that the conclusion reached was proper (that the plea presented no defense of which the law could take cognizance), the objection by demurrer may be treated as a

motion to strike out the plea, and the ruling of the circuit court be regarded as harmless error."

This plea, if a plea in abatement, seems to have been defective in not complying with § 3261, requiring such plea to state that S., the person not joined as codefendant by bringing him before the court, was a resident of the state, and the affidavit verifying it to state his place of residence, and so give the plaintiff a better writ, though the point was not raised.

MODE OF OBJECTING TO BILL FOR DEFECT OF PARTIES.

The Encyclopedia of Pl. and Pr., vol. 16, p. 599, lays it down that a plea to a bill on the ground of a defect of parties is the proper remedy, such a pleading being a pure plea, admitting the case made by the bill but maintaining that the plaintiff can not have the relief sought because of the defect of parties. Citing Ill., Mass., Mich., N. Y., Federal and other cases. Such a plea is a plea in bar. Citing Plunket *v.* Penson, 2 Atk. 51, and the cases generally above cited. This seems contrary to what the court here says as to such a plea being a plea in abatement. See what is said below under Plea in Abatement. See, also, Barton's Ch'y Pr. § 78, where it is said that, if the want of proper and necessary parties be not apparent from the bill or proofs, it may be raised by plea or answer. Citing Story's Eq. Pl., § 236; Mitchell *v.* Lenox, 2 Paige 280; Robinson *v.* Smith, 3 Paige, 222. See, also, id. § 112 (II), and IV Min. Inst. pt. 2, p. 1410-3rd. Ed.

PLEA IN ABATEMENT.

It is a rule of the common law that, if a party be omitted as defendant who is liable to be sued jointly with the defendants, the objection can be taken only by plea in abatement, verified by affidavit. 1 Chitty on Pl., p. 53, 16th Am. Ed.; Prunty *v.* Mitchell, 76 Va. 169; Wilson *v.* McCormick, 86 Va. 995, 11 S. E. 976.

This qualification is added to the rule, in Wilson *v.* McCormick, 86 Va. 995, 11 S. E. 976, "save when it appears on the face of the declaration." See Yeager *v.* Fairmont, 43 W. Va. 259, 27 S. E. 234, and other cases cited in 1 Va., W. Va., Enc. Dig. p. 7, et seq. 1 Bart. Law Prac. § 80.

The rule does not rest on § 3260, which only applies where it appears that some other court of equity has jurisdiction, rather than that in which the suit is brought. Jones *v.* Bradshaw, 16 Gratt. 355; Green *v.* Massie, 21 Gratt. 362. See Barton's Ch'y Pr. §§ 86, 117.

This rule of the common law, however, does not apply to objections to a bill for want of proper and necessary parties, as such objection may be made by demurrer, if the defect is apparent on the face of the bill, and by plea or answer if not so apparent, and an objection on this account may be raised at any stage of the cause, or even in the court of appeals, when it was not made below. See Barton's Ch'y Pr. §§ 78, 112 (II), 117.

And this plea in abatement does not fall under § 3259, which only applies to a plea *by the defendant* appearing to have been served. Here the plea is put in by his codefendant, and is practically a plea that he was not before the court because never served.

Such a plea as that in the instant case clearly falls under subdivision (11) of Mr. Minor's classification of the grounds of a plea to an original bill seeking relief, i. e., The Unnecessary Multiplication of Suits. See IV, Min. Inst. p. 2, pp. 1402, 1410-3rd. Ed.

The subject of pleas in abatement to a bill for want of jurisdiction (or, as Mr. Minor says they should be called, pleas to the jurisdiction—see IV, Min. Inst. pt. 2, p. 1343-3rd. Ed.) is covered by § 3260, which only applies where it appears that some other court of equity has jurisdiction, rather than that in which the suit is brought, or where the suit ought to be abated by reason of some circumstances attending the situation of the plaintiff or defendant or the like, and hence does not apply to a case like this, where the objection is for want of proper and necessary parties defendant. Jones *v.* Bradshaw, 16 Gratt. 355; Barton's Ch'y Pr. § 117.

PROCEEDINGS UPON PLEA.

If a plea is unexceptional in its form and character, the plaintiff should either reply to it and put in issue the facts relied upon, or he should set it down for argument. 16 Pl. and Pr., 618, citing Montgomery *v.* Olwell, 1 Tenn. Ch. 184; Rhode Island *v.*

Mass., 14 Pet. 257, 10 L. Ed. 423; Farley *v.* Kittson, 120 U. S. 314, 30 L. Ed. 684; Hatch *v.* Bancroft-Thompson Co., 68 Fed. 802.

A special replication to a plea in chancery is not allowed. Id., citing Barrett *v.* McAllister, 35 W. Va. 103; Dows *v.* McMichael, 6 Paige (N. Y.), 145; McClane *v.* Shepherd, 21 N. J. Eq. 76; Foley *v.* Hill, 3 Myl. & C. 482.

The proper method of testing the sufficiency of a plea is to set it down for argument. 16 Pl. & Pr., p. 618, citing cases from Ark., Ill., Md., Tenn., and Farley *v.* Kittson (supra); Hatch *v.* Bancroft-Thompson Co. (supra); Sharon *v.* Hill, 2 Fed. Rep. 29; Hughes *v.* Blake, 6 Wheat. 453, 5 L. Ed. 303; Harris *v.* Ingledew, 3 P. Wms. 94; Winters *v.* Claytor, 54 Miss. 341; Beck *v.* Beck, 36 Miss. 72. See, also, 6 Pl. & Pr. 396, to same effect, citing also, Thomas *v.* Brashear, 42 T. B. Mon. (Ky.) 67; Lester *v.* Stevens, 29 Ill. 155; Rouskulp *v.* Kirshner, 49 Md. 516. See, also, Barton's Ch'y Pr. § 116. The statute likewise contemplates this mode of excepting to the sufficiency of a plea. See § 3273 of Code of 1904.

And the setting of a plea for hearing on its sufficiency or taking issue upon it is held to be a step necessary to the progress of the cause. 16 Pl. & Pr. 618, citing Montgomery *v.* Olwell, 1 Tenn. Ch'y 183, holding that under Code, § 4390, a rule on the complainant to take any necessary step may be made during the term.

METHOD OF SETTING DOWN.

This is done either on petition or motion. If done by petition, the petition must contain the title of the cause, the time when the plea was filed, etc., and pray that it be set down for hearing, etc., upon which the court makes an order, and a copy of the petition and order is served on the opposite party. Raymond *v.* Simonson, 4 Blackf. (Ind.) 79, citing Beames Ord. in Ch. 121; 1 Newl. Prac. 119, and 1 Moult. Prac. 270. See, also, Mazarredo *v.* Maitland, 2 Madd. 38. *Either party* may have the sufficiency of the plea determined by setting it down for argument. 16 Pl. & Pr. 619, citing Story's Eq. Pl. (10th Ed.), § 697; I Daniell's Ch. Pl. and Pr. (6th Am. Ed.) 692.

A plea is not a frequent mode of defense in the equity practice, but when used the same rules of procedure which govern in the English Chancery practice, in the absence of statute or rules otherwise providing, obtain in the United States. 16 Enc. Pl. & Pr. p. 590, citing Chase *v.* McDonald, 7 Har. & J. (Md.) 160; Rouskulp *v.* Kershner, 49 Md. 516.

DEMURRER.

Setting down for argument is said to answer to a demurrer at law. 16 Pl. & Pr. 619, citing Flagg *v.* Bonnie, 10 N. J. Eq. 82; Rouskulp *v.* Kershner, 49 Md. 521; Burrell *v.* Hackley, 35 Fed. 833.

"But a demurrer is not recognized as an appropriate method of testing the sufficiency of a plea in equity." 16 Pl. & Pr. 619, citing Spangler *v.* Spangler, 19 Ill. App. 28; Lester *v.* Stevens, 29 Ill. 155; Dixon *v.* Dixon, 61 Ill. 324; Thomas *v.* Brashear, 4 T. B. Mon. (Ky.) 67; Beck *v.* Beck, 36 Miss. 72; Winters *v.* Claitor, 54 Miss. 341; Hannum *v.* McInturf, 6 Baxt. (Tenn.) 225; Graham *v.* Nelson, 5 Humph. (Tenn.) 609; Zimmerman *v.* So Relle, 80 Fed. Rep. 417; Travers *v.* Ross, 14 N. J. Eq. 254. See, also, article DEMURRERS IN CHANCERY, vol. 6, p. 391.

A demurrer is never resorted to for the purpose of settling the validity of a plea; such method of procedure is not recognized in the books. Id. citing Travers *v.* Ross, 14 N. J. Eq. 258; Raymond *v.* Simonson, 4 Blackf. (Ind.) 79; Winters *v.* Claitor, 54 Miss. 341; Hannum *v.* McInturf, 6 Baxt. (Tenn.) 225; Mitford's Pl. 367; Cooper's Eq. Pl. 111. See, also, Barton's Ch'y Pr., § 111, citing same authorities and Stone *v.* Moore, 26 Ill. 165; Dan. Ch'y Pr., vol. 1, p. 542, note.

"When, however, a complainant demurs instead of setting down for argument, the demurrer may be treated as equivalent to the proper course, although it is not regular, the objection being one of form. 16 Pl. and Pr. 619, citing Rouskulp *v.* Kershner, 49 Md. 521; Daniels *v.* Taggart, 1 Gill & J. (Md.) 311; Klepper *v.* Powell, 6 Heisk. (Tenn.) 503; Hannum *v.* McInturf, 6 Baxt. (Tenn.) 225; Raymond *v.* Simonson, 4 Blackf. (Ind.) 79; Spangler *v.* Spangler, 19 Ill. App. 28; Dixon *v.* Dixon, 61 Ill. 324; Zimmerman *v.* So Relle, 80 Fed. Rep. 417. See, also, Witt

v. Ellis, 2 Coldw. (Tenn.) 40. This seems to be precisely the case at bar.

Mr. Minor says, however, (IV, Min. Inst., pt. 2, p. 1421-3rd. Ed.) that "if the plaintiff conceives a plea to be defective in point of form or substance, he may, by demurrer, take the judgment of the court upon its sufficiency." Citing Mitf. Eq. Pl. 239; 2 Rob. Pr. (1st Ed.) 304, 305; V. C. 1873, ch. 167, § 33.

Examination of these authorities, however, with the exception of Mitf. Eq. Pl. which was not available, shows that they do not sustain the proposition for which they are cited. Robinson says: "If the complainant conceives any plea to be naught, either for the matter or manner of it, he may, at the next rules after the plea is put in, cause the same to be set down with the clerk to be argued, or if he thinks the plea good but not true, he may take issue upon it." Citing 1 R. C. 1819, p. 215, § 97; and pp. 256, 257, §§ 56, 57. He also says that if the complainant does not reply to or set for hearing a plea before the second court after filing the same, the bill may be dismissed with costs. And again, that upon a plea being argued and overruled, costs shall be paid as where the answer is adjudged insufficient. No other plea nor any demurrer shall be thereafter received. And again he says (p. 305), that the statute relating to the county and corporation courts provides that if the complainant thinks the plea good but not true, he may take issue upon it and proceed to proofs, etc. If the facts related by the plea are proved, and the plea is to the whole matter of the bill, a dismission of the bill at hearing is a matter of course. If the affirmative plea is not supported by evidence, and at the hearing he makes default, the complainant will be entitled to a decree against him, etc.

V. C. 1873, ch. 167, § 33, to which § 3273 of the Code of 1887 corresponds, likewise contemplates setting down the plea for argument, and says nothing about a demurrer thereto.

Mr. Minor also says, "that upon the argument the benefit of a plea may be saved to the hearing, or ordered to stand for an answer," which practice is borne out by other authorities.

DEMURRER REACHES BACK TO BILL.

Where a demurrer was recognized as the proper method of

testing the sufficiency of the plea, it was held that it presented the question of the sufficiency of the bill as well as of the plea. Id. citing Beard *v.* Bowler, 2 Bond (U. S.) 13.

MOTION TO STRIKE.

A motion to strike is not available for the purpose of testing the sufficiency of the plea as a defense. 16 Pl. & Pr. 620, citing Corlies *v.* Corlies, 23 N. J. Eq. 197; Armengaud *v.* Coudert, 23 Blatchf. (U. S.) 484.

MOTIONS TO SET ASIDE PLEA AND REPLY.

In Newton *v.* Thayer, 17 Pick. (Mass.) 129, there was a reply to a plea which the defendant moved to set aside, and the court held that if the complainant wished to insist that the plea was insufficient, whether true or not, his course was to move to set it aside. This being in the nature of a demurrer, the case as it stood might be considered as upon a motion to set aside the plea for insufficiency.

EFFECT OF SETTING DOWN FOR ARGUMENT.

Setting down a plea for argument avails the party only to test the sufficiency of the plea. 16 Pl. & Pr. 620, citing Snow *v.* Counselman, 136 Ill. 191; Meeker *v.* Marsh, 1 N. J. Eq. 198.

ADMISSION OF TRUTH.

If the complainant elects to set down a plea for argument he admits the truth of all the facts stated therein, and merely denies their sufficiency in point of law, to prevent a recovery. 16 Pl. & Pr. 620, citing Cammann *v.* Traphagan, 1 N. J. Eq. 28; Snow *v.* Counselman, 136 Ill. 197; Brown *v.* Solary, 37 Fla. 116; Wilson *v.* Fridenberg, 19 Fla. 461; York Mfg. Co. *v.* Cutts, 18 Me. 204; Rowley *v.* Williams, 5 Wis. 151; Rhode Island *v.* Mass. 14 Pet. 257, 10 L. Ed. 429; Farley *v.* Kitson, 120 U. S. 314, 30 L. Ed. 684; United States *v.* Cal., etc., Land Co., 148 U. S. 31, 37 L. Ed. 354; Wheeler *v.* McCormick, 8 Blatch. (U. S.) 271; Gallagher *v.* Roberts, 1 Wash. (U. S.) 320; Burrell *v.* Hackley, 35 Fed. 833; Behrens *v* Pauli, 1 Keen, 456.

On the other hand, a pure plea admits the case made by the bill (Gage *v.* Smith, 142 Ill. 195; Goldsmith *v.* Gilliland, 24 Fed. 154; Lilienthal *v.* Washburn, 4 Woods (U. S.) 65, so that when

a plea is set down for argument the condition of the pleadings will be taken as if the cause was argued on bill and answer, Id. citing Simons *v.* Milman, 2 Sim. 241. See, also, Brown *v.* Salary, 37 Fla. 116; Wilson *v.* Fridenburg, 19 Fla. 461. See IV, Min. Inst. pt. 2, p. 1418, 3rd. Ed.

QUESTIONS OF FORM OR IRREGULARITY—MOTION.

It is held that the proper course to pursue in order to take objection to a plea irregularly filed is by motion to take it off the files and not by setting it down for argument, because the latter course is only for the purpose of deciding upon the worth of the plea. 16 Pl. & Pr. 621, citing Bassett *v.* Salisbury Mfg. Co., 43 N. H. 249; Heartt *v.* Corning, 3 Paige (N. Y.) 566; Craig *v.* McKinney, 72 Ill. 305; Benson *v.* Jones, 1 Tenn. Ch. 498, holding that where more than one plea is filed to the same bill or to the same part of the bill, without leave of court, it might on motion be ordered to be taken from the files, or the court might perhaps direct this of its own motion; Farley *v.* Kittson, 120 U. S. 303, 30 L. Ed. 684; Ritchie *v.* Aylwin, 15 Ves. Jr. 79; Brooks *v.* Purton, 1 Y. & Coll. Ch. 278; Wild *v.* Gladstone, 19 L. J. Ch. N. S. 286, 15 Jur. 713, the defect in which case was the omission of the oath to the plea, but in Wall *v.* Stubbs, 2 Ves. & B. 354, it was held that the omission of the oath from a plea of matter in pais would cause it to be ordered to be taken off the file, although it had been set down for argument, as this irregularity would not admit of waiver; O'Brien *v.* White, 2 Hog. 237, holding that a motion to take a plea off the file because it was not sworn to should be made before the plea was set down for argument.

And a plea which alleges matters not proper to be brought forward by a plea may be stricken from the files on motion. 16 Pl. & Pr. 621, citing Armenguad *v.* Coudert, 23 Blachf. (U. S.) 484; Union Switch, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Fed. Rep. 833.

The question presented by such a motion is not whether the plea is good in matter of substance, but whether such a pleading can be interposed to the bill. Armenguad *v.* Coudert, 23 Blachf. (U. S.) 484.

EFFECT OF STRIKING FROM FILES.

If a plea is taken from the files for irregularity on the ground that it has not been properly sworn to, the defendant as a matter of course has the right to file a new plea properly verified. Heartt *v.* Corning, 3 Paige (N. Y.) 566.

UPON ARGUMENT OF PLEA.

It is held that upon the argument of a plea regularly set down, the question of technical form or irregularity can not be considered. 16 Pl. & Pr. 622, citing Tiernan *v.* Poor, 1 Gill & J. (Md.) 216; Davidson *v.* Johnson, 16 N. J. Eq. 112; Bassett *v.* Salisbury Mfg. Co., 43 N. H. 249; Heartt *v.* Corning, 3 Paige (N. Y.) 566; Kellner *v.* Mutual L. Ins. Co., 43 Fed. Rep. 623; Burrell *v.* Hackley, 35 Fed. Rep. 833. See, also, Wild *v.* Gladstone, 15 Jur. 713, 19 L. J. Ch. N. S. 286; Woods *v.* Creagh, 1 Hog. 221; O'Brien *v.* White, 2 Hog. 237.

CONCLUSIONS.

Thus it would seem, with all deference to the dictum of Judge Keith in this case, for which no authority is cited, that as the plea had already been filed in the clerk's office at rules, the proper course was for the plaintiff to have the plea *set down for argument,* and in this way, as the proper practice, to take the judgment of the court upon the sufficiency in law of the plea; and that neither the lower court nor Judge Keith was right as to the practice. It is a fact that a demurrer to a bill in chancery is to be *set down for argument* in order to test whether it is good or not in law and that the "joinder in demurrer," which so many lawyers use, is a purely common-law expression that has no place in chancery practice: and so, if there is a plea which the plaintiff thinks bad in law, he has it *set down for argument.* The primary object of the demurrer to a bill, or of the plea to a bill, was to avoid answering, either the whole bill or some specified part. (See IV, Minor's Inst. Pt. 2, p. 1401-3rd. Ed.) and the defendant would win out, if his demurrer was good, because he would not have to answer, and he would win out, if his plea was good in law, to the extent that if his plea was true in fact it would protect him from answering. So the practice arose of taking the judgment of the court as to the sufficiency in law of

the demurrer or plea by having these defenses *set down for argument,* as all the books of practice say. The demurrer in equity and the demurrer at common law proceed upon different theories, but it is hard to stop the use of "joinder in demurrer" in chancery pleading.

Also it would seem this plea should not be called a plea in abatement, but is more properly a plea in bar as it may be put in at any time. See what is said ante under Plea in Abatement.

Be that as it may, however, Judge Keith is undoubtedly right in saying that there was no prejudicial error, but that the demurrer may be treated as equivalent to the proper course, as is abundantly borne out by 16 Enc. of Pl. & Pr. p. 619, above quoted, and the authorities there cited.

The rule as to pleas in equity is just the reverse of what it is as to pleas at law, as there the objection to the plea *must be made* by *demurrer* or *motion to strike out,* where issue is not taken thereon, and confusion has no doubt arisen from not distinguishing the two rules and the character of the cases in which they are applied, as to whether at law or in equity. All the cases in Virginia and West Virginia that the writer has examined, which speak of demurring to or moving to strike a plea, have been cases at law, and ought not to affect the principles we have been discussing in relation to pleas in equity.

JAMES F. MINOR,

Charlottesville, Va.,
July 1911.